IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1017, 71-1026

MIKE GRAVEL, United States Senator,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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—v.—

MIKE GRAVEL, United States Senator,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members dedicated solely to defending the liberties guaranteed by the

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* Letters of consent, from counsel for the Government and Senator Gravel, to the filing of this brief have been filed with the Clerk of the Court.

Bill of Rights. The issues in this case involve a conflict between two important civil liberties principles: the requirement that a substantial degree of accountability be imposed upon public officials and the need for an independent legislative branch which will act to assure an informed citizenry. The purpose of this brief is to suggest principles for the resolution of these competing claims.

Summary of Argument

The purposes of the Speech or Debate Clause, and the balance of power between executive and legislature which it was designed to maintain, require a presumption in favor of strong legislative immunity from inquiries of the kind pursued here. This is particularly so when the actions being investigated by a grand jury involve a Senator's efforts to inform the public about the central political issue of our time.

I.

The primary purpose of the Speech or Debate Clause is to insure an independent legislature safeguarded against executive wrath. Accordingly, the cases make it clear that when acting within the legislative sphere, members of the Congress are immune from inquiry. This immunity extends beyond the halls of Congress and encompasses the type of public action involved here.

II.

Whether a similar immunity is available to legislative aides depends upon the purposes to be served by questioning the aide and the reasons advanced for breaching the

immunity. Where legislative employees are proceeded against in suits by private citizens seeking redress for the legislative denial of constitutional rights, the societal interests in vindicating those rights and the institutional requirements of judicial review have caused courts to refuse to grant immunity. However, where, as here, the purpose and effect of questioning aides and third persons will be to penalize legislative activity of a high order—informing the public—the general presumption of immunity must obtain.

ARGUMENT

Introduction

The precise issues in this case are framed in terms of the reach and scope of the Speech or Debate Clause contained in Article I of the Constitution. But their resolution implicates a clash between two larger contending values. On the one hand, there is the important societal interest in imposing upon public officials and their aides, be they legislative or executive, a substantial degree of accountability for their actions. On the other is the requirement, particularly important in our democratic society, that legislators have the independence and immunity which helps insure that representative government will be a reality. Both sets of values are central to the advancement of those civil liberties with which the American Civil Liberties Union is institutionally concerned. Blanket immunity of public officials from judicial scrutiny is an invitation to arbitrary government. Timidity by legislative officials is inconsistent with representative government.

On balance, the presumption must be in favor of a broad legislative immunity for a number of reasons. First, of

course, the Speech or Debate Clause provides specific textual and historical support for such a view. Second, in practical terms, the capacity for mischief as a result of broad legislative immunity is far less than the dangers involved in affording a similar immunity to the executive branch. Finally, and most importantly, recent American history has witnessed a significant accretion of executive power at the expense of legislative authority. This has been particularly true with regard to the overriding issues of foreign and military policy. Accordingly, the claim to legislative immunity is singularly forceful when it is interposed to prevent executive inquiry into the events surrounding a legislator's publication of a history of the Vietnam war.

But there is a key limiting principle to the presumption of absolute legislative immunity. Whenever legislative action invades or deprives *private citizens* of constitutionally protected rights, then the presumption must give way. Accordingly, while legislators themselves probably remain immune from suit brought by such individuals, courts have frequently—and properly—refused to confer such immunity upon aides or others sued for specific infringement of constitutional rights. In this fashion the interests in judicial review and redress of violations of constitutional rights by the legislative branch, as well as the need for legislative immunity, are reconciled. But where, as here, the breach of legislative immunity is not sought in order to vindicate a private citizen's constitutional rights, then the analytic presumption of absolute legislative immunity is not defeated.

Finally, we suggest that the analysis of the executive branch's effort to breach legislative immunity in this case cannot be divorced from considerations of the kind of investigation being conducted and the forum in which it

occurs. First, the fact that it is a grand jury which is seeking information provides no additional support for the inquiry. As this Court knows, there are numerous exceptions to what the government characterizes as "the normal duty of all citizens to testify before the grand jury about any matter of which they have knowledge." (Gov't Brief, p. 54.) Moreover, and unfortunately, it is questionable whether federal grand juries today can still be regarded as "a primary security to the innocent against hasty, malicious and oppressive persecution . . . " *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962). See generally, F. J. Donner and E. Cerruti, "The Grand Jury Network," *The Nation,* January 3, 1972, pp. 5-20.

But most importantly, it must be remembered what "crimes" this grand jury was investigating. This was not an inquiry into influence peddling by Congressmen or their aides. It was an attempt to ascertain those persons responsible for disclosing the Pentagon Papers to the American people. No incantation of the specific provisions of the federal criminal code alleged to have been violated should obscure that fact. It has been our position that the American people were absolutely entitled to receive the information contained in those documents. See Brief of the American Civil Liberties Union, *Amicus Curiae,* in *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), at pp. 17-19. The Government's continued effort, first to frustrate that result and now to punish those who made it possible, is a fundamental breach of the common national understanding that the people have the right to know what their government is doing. Senator Gravel, as well as those who assisted him, was implementing this common bond.

If, as the government's actions seem to imply, neither the press nor the legislature is constitutionally entitled to tell us about the policies of our government, who is?

I.

The central purposes behind the Speech or Debate Clause immunize Senator Gravel from inquiry concerning the publication of the Pentagon Papers.

Senator Gravel's brief contains an exhaustive analysis of the history and purposes of the Speech or Debate Clause, and we can add little to it. The important point to note is that the inquiry which the government here pursues is the paradigm of the kind of evil which the Clause was intended to prevent, namely an attempted breach by the executive branch of the constitutional separation of powers.

The legislative privilege embodied in the Speech or Debate Clause grew out of historic disputes between members of the English Parliament and the Crown. It was designed to protect the legislators from the King's wrath, so that they would not be deterred from discussing and acting upon the issues of the day. A shield against intimidation, the privilege was meant to insure the independence of the legislature. See, Comment, 43 N.Y.U. L. Rev. 1227 (1968). When added to our Constitution in the Speech or Debate Clause, the privilege had the same purpose. In explaining that purpose, this Court in *Tenney* v. *Brandhove*, 341 U.S. 367, 373 (1951), quoted the writings of James Wilson, a member of the Committee of Detail which had been responsible for addition of the Clause to the Constitution:

> In order to enable and encourage a representative of the public to discharge his public trust with firm-

> ness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech and that he should be protected from the resentment of everyone. . . . 1 *The Works of James Wilson,* 421 (R. McCloskey ed., 1967).

In light of this clear purpose of the Clause, there can be little quarrel that Senator Gravel cannot be questioned with regard to anything he says or does on the floor of the Senate, *Tenney* v. *Brandhove, supra; United States* v. *Johnson,* 383 U.S. 169 (1966), nor for any written reports of committee proceedings addressed to Congress, including printed material inserted directly into the record. *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881). Nor can he be questioned about his actions at the meeting of the Subcommittee on Buildings and Grounds on June 29, 1971. Finally, since effective debate presupposes access to facts, the Speech or Debate Clause also grants immunity from inquiries which would restrict acquisition of information. See Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 30 Harv. L. Rev. 153, 205-06 (1926); cf. *Caldwell* v. *United States,* 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 402 U.S. 942 (1971). Accordingly, it is with good reason that the Government seems to have abandoned its earlier intention to subpoena the Senator.

Perhaps the only significant issue with regard to Senator Gravel's immunity is whether the Clause protects him from inquiry as to his efforts to effect the publication of the Pentagon Papers by Beacon Press.

The Papers having been read into the public record of the Senate subcommittee by Petitioner, were in the public domain. We think that the Court of Appeals, therefore, was in error when it asserted that because the

function of Petitioner's subcommittee was unrelated to the contents of the Pentagon Papers, it stood outside the protection of the Speech or Debate Clause. But the occasions when a court has examined the powers of a legislative committee have been limited to cases in which the power of Congress under the Constitution has been in issue, e.g., *Kilbourn* v. *Thompson, supra,* or where the constitutional rights of individuals have been jeopardized by Congressional action, as in cases of contempt of Congress, e.g., *Watkins* v. *United States,* 354 U.S. 178 (1957).

Accordingly, the Speech or Debate Clause clearly protects such legislative activities as obtaining material for committee hearings, *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), conduct at the hearings, *Tenney* v. *Brandhove, supra,* and Committee resolutions and votes, *Powell* v. *McCormack,* 395 U.S. 486, 502-503 (1969). And several courts have held that the Speech or Debate Clause affords complete protection to Congressmen with regard to the publication of committee records. *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D. D.C. 1956); *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D. D.C. 1970); *Doe* v. *McMillan,* —— F.2d ——, 40 Law Week 2471 (D.C. Cir. 1972, No. 71-1027). Cf. *Hearst* v. *Black,* 84 F.2d 68 (D.C. Cir. 1936).

Although these cases involved publication by the Public Printer, they are in no way different from the present case. Many Congressmen and public officials now customarily use private means to disseminate reports and records in order to reach the widest possible public. Only in this way can our electorate remain informed and our legislators properly fulfil their role relating to the due functioning of the legislative process. Petitioner's action in arranging for the publication of the Pentagon Papers is in exactly the

same position as that of all members of Congress, who routinely inform their constituents by issuing press releases and by circulating copies of their speeches and committee records and reports.

Finally, since the information publicly distributed is not of the kind which directly infringes the constitutional rights of private citizens, there is no occasion for consideration of the limiting principle on a legislator's immunity.

II.

The purposes of the Speech or Debate Clause require that Congressional aides be immune from the kind of inquiry pressed here.

The Court of Appeals held, in effect, that Congressional aides are entitled to an immunity under the Speech or Debate Clause coextensive with that of the Congressman they serve. For reasons set forth *infra,* we suggest that while such a result is required in this type of case, there are instances where such equivalence of immunity should not be allowed. In essence we submit that the differing results would turn on the purpose to be served by making the inquiry and the reasons offered for breaching the immunity. Where, as here, the primary purpose of the inquiry of the aide is to weaken the separation of powers between the executive and legislative branches, that inquiry cannot be allowed.

The Government seems to argue that the case turns on the formal distinction in status between a member of Congress and an aide or employee. To be sure, that distinction is important. The Clause itself speaks only of "Senators and Representatives," and many cases have honored the

member's claim of immunity, while rejecting the aide's. But the status of the person proceeded against is only the beginning of the inquiry, not the end.

In several important cases this Court and the lower federal courts have refused to hold that the Clause confers on legislative employees immunity *from suits brought by private citizens seeking redress for the legislative denial of constitutional rights.* We think this qualification is vital to an explanation of the various decisions under the Clause. For in none of the cases where civil suits were allowed to proceed against legislative employees was the central purpose of the Clause being undermined. To the contrary, in all those cases the plaintiffs were seeking to override the claim of legislative privilege in order to vindicate constitutional right, and the courts were discharging their institutional responsibility of judicial review of formal legislative actions.

Thus, in the earliest of this Court's decisions, *Kilbourn v. Thompson, supra,* the Court held that the Speech or Debate Clause barred the conclusion that Congressional defendants were personally liable in a false imprisonment action brought by a recalcitrant witness who had been confined pursuant to a House Resolution. However, the Court did proceed to adjudicate the merits of the plaintiff's complaint. And it held that passage of the Resolution and incarceration of the plaintiff had been unconstitutional. The Court permitted the injured witness to sue the House Sergeant-at-Arms who had simply executed the warrant of arrest at the direction of his Congressional employers.

A similar result was reached in *Dombrowski v. Eastland,* 387 U.S. 82 (1967). There the petitioners claimed that a Senator and his subcommittee counsel had entered into a

conspiracy to violate petitioners' Fourth Amendment rights. With regard to the Senator, this Court found no evidence of his involvement in actions beyond the sphere of legitimate legislative activity and, accordingly, upheld his claim to immunity under the Clause. But this Court declined to extend the same cloak of immunity to the staff employee, whose presence as a defendant enabled appropriate judicial scrutiny of the challenged Congressional activity.

These doctrines received the closest attention in *Powell v. McCormack, supra.* The Court adjudicated the constitutionality of the actions taken by Congress and held that the exclusion of Congressman Powell had been unlawful. In reaching this result, the Court held that the suit could be maintained against the Congressional employees, although not against the Congressmen themselves:

> The Court first articulated in Kilbourn and followed in Dombrowski v. Eastland the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. . . . *That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision* . . . [T]hough this action may be dismissed against the Congressmen, petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell. 395 U.S. at 504-506. (Emphasis added.)

This understanding has been reflected in lower court decisions as well. See, *Stamler* v. *Willis,* 415 F.2d 1365 (7th

Cir. 1970) ("The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government. . . . The Congress has no more right, whether through legislation or investigations conducted under an overbroad enabling Act, to abridge the First Amendment freedoms of the people, than do the other branches of government . . . " *Id.* at 1370); *Davis* v. *Ichord,* 442 F.2d 1207 (D.C. Cir. 1970) ("This judicial admonition [against judicial interference with legislative investigations], however, enunciated in cases which involved only part of the spectrum of the judiciary's responsibility in relation to Congress, must be read with decisions of the Supreme Court where individual rights were alleged to be infringed by Congress in circumstances which required constitutional adjudication." *Id.* at 1213); *Doe* v. *McMillan,* —— F.2d ——, 40 Law Week 2471 (D.C. Cir. 1972, No. 71-1027) (dissenting opinion at Slip Op. pp. 29-37); *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D. D.C. 1970).

The typical pattern of these cases is apparent. Overt, formal legislative action is alleged to have infringed constitutional rights. Suits, usually injunctive, are filed against members and staff employees. The action is not allowed as to the member, but proceeds against the employee, thus enabling judicial review to go forward to adjudicate the constitutionality of actions of a coordinate branch of government. The presence of the Congressional employees provides the means to secure judicial review of the constitutionality of the underlying action, without inhibiting Congressmen in their duties. See *Powell* v. *McCormack, supra* at 506.

Consequently, those decisions holding that the Speech or Debate Clause does not provide an immunity defense to legislative employees must be read in light of their rationale, that withholding immunity is required in order to vindicate constitutional rights and to effectuate judicial review. This doctrine is in accord with the general constitutional impulse to provide remedies for violations of such rights, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the exception to immunity is justified.

The situation here is precisely the converse. No constitutional rights are sought to be advanced by the government. Rather, information is sought in order to punish persons engaged in or assisting legitimate legislative activity of a high order of importance—informing the public about the foreign policy decision-making process. The historical purposes of the Clause *are* attacked by this inquiry, the normal presumption of legislative immunity should prevail, and the member's absolute immunity should encompass the aide.

The distinction we urge is simple: legislative aides have no immunity to act unconstitutionally against private citizens, but they do have immunity from inquiry as to their role in implementing legitimate legislative activity.

CONCLUSION

Having failed to restrain the publication of the Pentagon Papers, the government now seeks to identify and punish those who may have assisted in making those documents available to the public. In this case, the policies of the Speech or Debate Clause, as well as those of the First Amendment, require that the effort be interdicted and the subpoenas be quashed.

Respectfully submitted,

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